No. 96-1578 (8)

In The

Supreme Court of the United States

October Term, 1996

HON. THOMAS R. PHILLIPS, HON. RAUL A. GONZALEZ, HON. NATHAN L. HECHT, HON. JOHN CORNYN, HON. CRAIG T. ENOCH, HON. ROSE SPECTOR, HON. PRISCILLA OWEN, HON. JAMES A. BAKER, HON. GREG ABBOTT, IN THEIR OFFICIAL CAPACITIES AS JUSTICES OF THE TEXAS SUPREME COURT; TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION; AND W. FRANK NEWTON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION,

Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, AND MICHAEL J. MAZZONE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Is interest earned on client trust funds held by lawyers in IOLTA accounts a property interest of the client or lawyer, cognizable under the Fifth Amendment of the United States Constitution, despite the fundamental precept of IOLTA that such funds, absent the IOLTA program, could not earn interest for the client or lawyer?

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BRIEF FOR PETITIONERS

Petitioners, the individual Justices of the Texas Supreme Court, the Texas Equal Access to Justice Foundation, and W. Frank Newton, in his official capacity as Chairman of the Texas Equal Access to Justice Foundation, respectfully request that the portion of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on September 12, 1996, reversing the District Court below, be reversed.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 94 F.3d 996 and is reprinted in the Appendix to the Petition for a Writ of Certiorari. Pet. App. A. The decision of the District Court is reported at 873 F. Supp. 1 and is also reprinted in the Appendix to the Petition for a Writ of Certiorari. Pet. App. B. The order denying Petitioner's request for panel rehearing and the dissenting opinion from the denial of rehearing *en banc* are reported at 106 F.3d 640 and are also reprinted in the Appendix to the Petition for a Writ of Certiorari. Pet. App. C.

JURISDICTION

The judgment of the Fifth Circuit was entered on September 12, 1996. Petitioners timely filed a request for panel rehearing and simultaneously requested rehearing from the Fifth Circuit *en banc*. The petition for panel

rehearing was denied on February 14, 1997. The petition for rehearing *en banc* was denied, with six judges dissenting, on the same day. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1993).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution and a relevant federal statute are reprinted in the Appendix to the Petition for a Writ of Certiorari. Pet. App. D. Selected orders and regulations promulgated by the Texas Supreme Court are also reprinted in the Appendix to the Petition for a Writ of Certiorari. Pet. App. E-G. The rules governing the operation of the Texas Equal Access to Justice Program are reprinted in the Joint Appendix.

STATEMENT OF THE CASE

Factual Background

Interest on Lawyers' Trust Accounts – IOLTA – programs have been approved in all fifty states and the District of Columbia.[1] The Texas program enables traditionally non-interest bearing client trust fund accounts to

[1] Twenty-seven jurisdictions have mandatory IOLTA programs; twenty-four jurisdictions have optional participation. IOLTA programs have been adopted by court rule in forty-four states and the District of Columbia and by statute in six states. The Indiana Supreme Court has approved in principle the adoption of an IOLTA Program, but the program is not yet operational.

provide interest that finances basic legal services to low-income citizens. The American IOLTA concept originated in Florida, and has since become the backbone of pro bono legal programs throughout the United States.[2] Nationwide, IOLTA programs currently generate about $100 million per year. IOLTA programs are second only to federal grants as a source for funding legal services to low-income Americans, helping to provide basic legal services to an estimated 1,700,000 citizens each year. Congressional funds made available through the Legal Services Corporation provide for salaried attorneys who serve the poor full-time. IOLTA programs fund a variety of staff attorney programs, support the part-time pro bono work of private attorneys discharging their ethical obligations, and fund a range of other administrative, educational, and public justice functions.

The Texas IOLTA program began to receive income in 1985, when just under $47,000 was generated. Even though this initial program depended on voluntary participation by lawyers, it eventually yielded almost $1 million annually. By Order of the Texas Supreme Court, as of July 1989, every Texas attorney is required to participate in IOLTA, which now produces about $5 million a year.

To understand why the operation of the Texas IOLTA program and similar programs in other states does not

[2] *Matter of Interest on Trust Accounts*, 538 So. 2d 448, 449 (Fla. 1989); *see also* W. Frank Newton & James W. Paulsen, *Constitutional Challenges to IOLTA Revisited*, 101 Dickenson L.Rev. (forthcoming 1997).

violate the Constitution, it is necessary to examine the historic treatment of money received by lawyers from, or on behalf of, their clients, as well as the recent development in federal banking law that made IOLTA programs possible.

Lawyer Trust Accounts Before 1980

For as long as law has been practiced, lawyers and clients have found it desirable, for a variety of reasons, to place client money in the lawyer's possession. The money might be retained as security against future billings, filing fees, or other costs, or the funds might be placed in escrow in anticipation of a real estate closing. For these and many other reasons, an attorney trust account can be convenient for both the attorney and the client. The deposit of client money in an attorney's trust account, however, also offers a unique opportunity for an attorney to abuse a client's trust. As a result, such accounts have historically been the subject of legislative and judicial regulation.

Absent an agreement with the client, rules of professional conduct required that client funds be available on the client's demand and, in all events, prohibited attorneys from benefiting in any way from client's funds. Supreme Court of Texas, State Bar Rules, art. X § 9, Tex. Disciplinary R. of Prof. Conduct 1.14 (Vernon Supp. 1993). Demand deposits were thus aggregated into "trust accounts" held by attorneys in their law firms' names. Because federal banking law did not permit the payment of interest on demand-deposit accounts (*i.e.*, checking accounts), neither lawyers nor their clients received

interest income from the deposit of client funds. Only the financial institution benefited from the deposit.

The 1980 Amendments to Federal Banking Law

In 1980, Congress authorized, with some significant limitations, Negotiable Order of Withdrawal ("NOW") accounts, which for the first time permitted banks to pay interest on demand deposits. 12 U.S.C. § 1832 (1989). Lawyers were thus able to deposit client funds into interest-bearing checking accounts for the benefit of certain clients while simultaneously satisfying the ethical requirement that client trust funds be available upon demand. Indeed, as fiduciaries, lawyers were obligated to deposit these funds into interest-bearing accounts if they were capable of generating interest income in excess of the cost of opening and maintaining the account.

However, even with the advent of NOW accounts, lawyers still received funds incapable of earning interest for the client. For example, NOW accounts are only available to individuals and charitable entities. 12 U.S.C. § 1832(a)(2) (1989).[3] Thus, business entities organized as corporations or partnerships cannot receive interest on a demand deposit. More significantly, the funds of non-business clients are often simply too small in amount or are likely to be held for too short a period of time to earn interest in excess of the bank's service charge and the

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[3] That section permits interest-bearing demand accounts consisting "solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for . . . charitable . . . purposes and which is not operated for profit." 12 U.S.C. § 1832(a)(2) (1989).

lawyer's administrative fee for opening and maintaining a non-IOLTA account. In addition, under the Internal Revenue Code, the income from each subaccount in any pooled account must be reported separately, for which either the bank or the lawyer could properly charge the client a fee.

The Nationwide Adoption of Interest on Lawyer Trust Accounts Programs

In the years following the banking amendments, all fifty states and the District of Columbia adopted ethical rules permitting or requiring attorneys to maintain trust accounts for client funds that are, in the lawyer's judgment, either too small or likely to be held for too short a time to generate interest in excess of the cost required to open and maintain a demand account for the client. These programs generate interest on otherwise unproductive funds and distribute the proceeds to non-profit organizations designated by the legislature or the judiciary to provide legal services to those in need. Funds from depositors ineligible under federal banking laws, such as partnerships or corporations, can lawfully be pooled under 12 U.S.C. § 1832(a)(2) in an IOLTA account, because all of the interest belongs to an eligible non-profit organization. (R. Vol. 3, p. 386). Of greater importance, interest earned on small amounts or funds held for a short time need not be subaccounted by the lawyer or the bank and need not be reported to the IRS. Rev. Rul. 87-2, 1987-1 C.B. 18.

Under the Texas IOLTA rules, when a client entrusts a lawyer with funds, the lawyer must initially determine

whether the funds are capable of returning net interest to that client. In determining the cost of maintaining the account, attorneys consider the cost to the client of opening the account, including his own charge, the bank's fee and the tax reporting cost, the amount of the principal, and the duration of the deposit. *See* IOLTA Rule 6, J.A. at 113-14. If an account is available in which net interest can be earned by the client (or clients, if pooling is permitted by federal banking laws), the lawyer must deposit the client funds into that account. (Newton Affidavit, J.A. 73-74). In many cases, the client's funds are very small, such as a modest retainer, a filing fee, or a refund on expenses; in other cases they are likely be to held for a very short period – a settlement about to be dispersed or a real estate transaction on which only the final title check is to be done. In neither case would there be any net interest income to the client. But IOLTA takes advantage of the charitable exception to the NOW account restrictions by pooling these deposits into a single aggregated account maintained by the lawyer with a nonprofit foundation designated as the beneficiary of that account.

For example, assuming that the total cost to the client for opening an account is $100, a NOW account paying 2% interest, which is typical of such accounts, would yield net income on a $100,000 principal deposit after only 19 days. On the other hand, a deposit of $1,000 under like conditions would require 1,825 days to yield a net return. If client funds are capable of earning net interest in any amount, however, the funds are not eligible for deposit in an IOLTA account. (Newton Affidavit, J.A. 73-74).

IOLTA programs do not require that clients deposit trust funds with their attorneys. That decision, just as it

was before the commencement of IOLTA, is a matter between the individual client and attorney. Moreover, IOLTA itself imposes no interference or restriction upon the client's use of, or access to, the principal amount of the funds deposited in the trust account. The Texas IOLTA Program merely requires lawyers, choosing to accept client funds, to deposit the client funds in an IOLTA account when no account is available that will yield net interest to the client. IOLTA Rule 4, J.A. at 111. Finally, although no bank is required to participate in an IOLTA program, every bank does so voluntarily.

IOLTA programs were not implemented without constitutional scrutiny. Legal issues were raised in every state, and the responses can be found in written administrative orders accompanying the creation of IOLTA programs,[4] in more traditional adversarial proceedings,[5] and, in 1987, in a celebrated federal court contest that sought

[4] *E.g., Petition by Massachusetts Bar Ass'n*, 478 N.E.2d 715 (Mass. 1985) (finding no affected property interest); *Matter of Interest on Lawyers' Trust Accounts*, 675 S.W.2d 355 (Ark. 1984) ("funds in question are not now available to individual clients, and for practical reasons cannot be made available to them"); *Matter of Interest on Lawyers' Trust Accounts*, 672 P.2d 406 (Utah 1983); *Petition of New Hampshire Bar Ass'n*, 453 A.2d 1258 (N.H. 1982) (finding no takings impediment); *Matter of Minnesota State Bar Ass'n*, 332 N.W.2d 151, 158 (Minn. 1982) ("no client has a property interest"); *Matter of Interest on Trust Accounts*, 538 So. 2d 448 (Fla. 1989).

[5] *See, e.g., Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962 (1st Cir. 1993); *Carroll v. State Bar of Cal.*, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305 (Cal. Ct. App. 1984).

to derail Florida's program.[6] In nine adversary or administration decisions IOLTA programs were upheld and constitutional challenges found wanting; in Indiana, the State Supreme Court reversed its earlier position and adopted an IOLTA Program in principle in 1995.[7] Three relevant administrative decisions were issued by the Texas Supreme Court. Each constitutes an affirmation of the Texas IOLTA program's constitutionality: a 1984 Texas Supreme Court administrative order implementing the state's voluntary IOLTA program,[8] a 1985 administrative order which specified that the Texas Equal Access to Justice Foundation "shall hold the entire beneficial interest in the interest generated,"[9] and a 1988 administrative order converting the voluntary program to a mandatory program.[10] Chief Justice Pope, who presided over the Texas Supreme Court in 1984 when the Texas IOLTA program was created, recently said, "[t]here clearly are no constitutional implications. The only funds that qualify for IOLTA accounts are those that never could have

[6] *Cone v. State Bar of Florida*, 819 F.2d 1002 (11th Cir.), *cert. denied*, 484 U.S. 917 (1987).

[7] *See, e.g.*, Brennan J. Torregrossa, Note, *Washington Legal Foundation v. Texas Equal Access to Justice Foundation: Is There an IOTA of Property Interest in IOLTA?*, 42 Vill. L.Rev. 189, 191 n. 8 (1997).

[8] Texas Supreme Court, Order of May 9, 1984 (available from Texas Supreme Court Clerk's Office).

[9] Texas Supreme Court, Order of July 1, 1985 (available from Texas Supreme Court Clerk's Office).

[10] Texas Supreme Court, Order of December 13, 1988 (available from Texas Supreme Court Clerk's Office).

earned interest for the client anyway. Nothing is taken."[11] Conversion of the voluntary program to a mandatory program in 1988 was prompted by a request from the State Bar of Texas, accompanied by a brief which discussed the question of whether any property right under Texas law was taken.[12] Like every other program to be challenged, the Texas program was upheld.

Proceedings Below

Notwithstanding the extensive review of the constitutional questions surrounding IOLTA in Texas and elsewhere, the Washington Legal Foundation brought suit against the Justices of the Texas Supreme Court, a Foundation created by Order of that Court to provide legal assistance to the poor, and the individual administering that Foundation challenging the Texas IOLTA Program. The suit was filed under 42 U.S.C. § 1983 (1994) on February 7, 1994, in the United States District Court for the Western District of Texas. Subject matter jurisdiction was based on the presence of a federal question under 28 U.S.C. §§ 1331 & 1343 (1994).

Plaintiff-Respondent Washington Legal Foundation is a self-professed conservative "public-interest law firm" that claims to have members in Texas who are opposed to the Texas IOLTA Program. Plaintiff-Respondent Mazzone is an attorney admitted to practice in Texas; Plaintiff-Respondent Summers is a client of Respondent Mazzone.

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[11] Newton & Paulsen, *supra* note 2 at 24.

[12] *Id.* at 25.

All advance a Fifth Amendment claim to "just compensation" focused on the interest proceeds allegedly "taken" by the Texas IOLTA Program and a First Amendment claim stemming from their objections to how the funds generated by IOLTA are spent. The Fifth Amendment claim to just compensation, applied through the Fourteenth Amendment, is a restatement of the most consistent and seriously treated constitutional complaint about IOLTA. To this often litigated, but never successful, constitutional claim a new wrinkle is added: Plaintiffs borrowed from the law of real property, arguing that one of the core "sticks" in the "bundle of property rights" is the right to exclude others from benefiting from your money. According to this theory, even if clients could not expect to profit from IOLTA interest, they still had a "beneficial interest" in that property, including the right to exclude others from its use. Further, this new interest was also characterized as implicating First Amendment rights, as Plaintiffs objected to the money, which they could not have received themselves, being used to support legal services to the poor.

The District Court refused to dismiss under Federal Rule of Civil Procedure 12(b), considered cross-motions for summary judgment, reviewed summary judgment evidence and concluded that none of the Respondents could identify any property interest or expectation belonging to them that had been appropriated. Respondent Summers offered no proof that any of his funds deposited in an IOLTA account were capable of earning even a cent of interest for his benefit. By stark contrast, Petitioners offered undisputed proof that the Texas

IOLTA program was established as part of the disciplinary rules governing the conduct of Texas lawyers (Cook Affidavit, J.A. at 55-60), that only funds legally or economically incapable of earning interest to benefit clients were eligible for deposit in IOLTA accounts (Newton Affidavit, J.A. at 73-74 and 77), and that lawyers or clients have never had a reasonable expectation to receive interest earned on nominal or short-term funds (England Affidavit, J.A. at 64-67; Newton Affidavit, J.A. at 74-77).

On appeal, the Fifth Circuit reversed. The panel did not mention the Washington Legal Foundation's novel claims – that there was some "beneficial interest" or "right to exclude" accruing to clients or that First Amendment rights of commercial expression were somehow infringed. Instead, the panel explicitly broke with the First and Eleventh Circuits, as well as opinions from several state courts, in order to hold that this Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), compelled a finding that clients had an ownership interest in the interest generated by client trust funds – an argument so doubtful that Washington Legal Foundation did not even raise it in its earlier First Circuit challenge.

Petitioners sought a rehearing *en banc*, which was denied over a vigorous dissent. The dissenters pointed out that there was a critically important difference between gross interest and net interest. In this case, the facts showed that gross interest could be earned on IOLTA accounts, but no net interest could be received by individual clients. Thus, according to the dissenters, the absence of any property interest of the Respondents prevented triggering Fifth Amendment just compensation claims.

Both sides sought certiorari. This Court refused to grant certiorari to review whether this case raised issues of state's rights or to review claims, raised by Respondents' Cross-Petition, that this case should be used to review sovereign immunity under the Eleventh Amendment. Rather, certiorari was granted to review the question whether IOLTA programs interfered with property rights in ways that violated either the First or the Fifth Amendments. Thereafter, an additional Order was entered by this Court that limited review to whether IOLTA programs interfered with property rights under the Fifth Amendment.

SUMMARY OF ARGUMENT

The Texas IOLTA Program requires attorneys holding certain client funds in trust to deposit them into an aggregated account if the funds are either too small or likely to be held for too short a time to generate interest in excess of the expense of opening and maintaining the account. The revenue generated by the IOLTA program is used to fund legal services for the State's poor.

The Texas IOLTA Program does not take "property" from anyone. None of the Respondents has lost any interest income or suffered any financial or other loss as a result of the program they challenge. In essence, Respondents object to the fact that interest (which they could not have earned themselves) is being used to provide legal services to the poor. But since they have no right to that interest, Respondents have no legal basis to object to how the money is being used. The response to claims made by

the attorney, Mazzone, and the public-interest law firm, Washington Legal Foundation, is clear and simple: under no set of circumstances did either have any economic interest in the interest proceeds. Likewise, the response to the claim made by the client, Summers, is clear when the facts established in the trial court are considered under the appropriate state law and the constitutional jurisprudence of this Court. There is no "taking" of "property" where the claimant can point to no financial loss as a result of the action he challenges. Respondent Summers has no cognizable expectation – under any recognized Texas definition of the term "property" – to the interest generated from an IOLTA account.

The Texas IOLTA Program does not violate any traditional, fundamental notion of liberty. Rather, the Texas program, and nearly identical programs in place in virtually every state of the Union, are an ordinary and entirely appropriate exercise of sovereign state power affecting no legitimate interest of the Respondents.

ARGUMENT

Respondents challenge the Order creating the IOLTA program, claiming it so interferes with their interests as to amount to a taking of their property requiring just compensation. Before the Fifth Circuit panel's decision in this case, Respondents and others had attempted identical challenges in other jurisdictions. The First and Eleventh Circuits both concluded that IOLTA programs functionally identical to the Texas IOLTA Program did not effect a taking of any property. Likewise, every state

court of last resort to address the question has arrived at the same conclusion.[13] This overwhelming majority is plainly correct.

I. RESPONDENTS MAZZONE AND WASHINGTON LEGAL FOUNDATION HAVE NOT BEEN SUBJECTED TO A TAKING, EVEN UNDER THE FIFTH CIRCUIT PANEL'S APPROACH

Not even the Fifth Circuit panel in this case would recognize any property right inuring to Mazzone as an attorney or to the Washington Legal Foundation. Respondent Mazzone complains of a restriction of his freedom of action. He would prefer not to participate in the Texas IOLTA programs because he disagrees with its objectives. Likewise, Respondent Washington Legal Foundation, because of the political and ideological objections of the organization, would prefer that IOLTA programs simply not exist. However, the Just Compensation Clause is strictly a vehicle for indemnity of cognizable economic

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[13] *E.g., Petition by Massachusetts Bar Ass'n*, 478 N.E.2d 715 (Mass. 1985) (finding no affected property interest); *Matter of Interest on Lawyers' Trust Accounts*, 675 S.W.2d 355 (Ark. 1984) ("funds in question are not now available to individual clients, and for practical reasons cannot be made available to them"); *Matter of Interest on Lawyers' Trust Accounts*, 672 P.2d 406 (Utah 1983); *Petition of New Hampshire Bar Ass'n*, 453 A.2d 1258 (N.H. 1982) (finding no takings impediment); *Matter of Minnesota State Bar Ass'n*, 332 N.W.2d 151, 158 (Minn. 1982) ("no client has a property interest"); *Matter of Interest on Trust Accounts*, 538 So. 2d 448 (Fla. 1989); *see also Carroll v. State Bar of Cal.*, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305 (Cal. Ct. App. 1984).

injury to property rights of the objecting party. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 512 (1979); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

Participation in the IOLTA program has not caused any financial loss to Respondent Mazzone. The Texas Rules of Professional Conduct prohibit attorneys from benefiting in any way from their clients' trust accounts. Supreme Court of Texas, State Bar Rules art. X § 9, Tex. Disciplinary R. of Prof. Conduct 1.14 (Vernon Supp. 1993). The propriety of these rules is undisputed. Mazzone is merely required to maintain his clients' funds in a trust account, just as he was before IOLTA. This "burden" is no different in kind from other obligations assumed by virtue of obtaining a license to practice law. *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991) ("lawyers . . . [are] subject to ethical restrictions . . . to which the ordinary citizen would not be"). As Justice Cardozo noted: "[m]embership in the bar is a privilege burdened with conditions." *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917).

Texas attorneys are required to pay an occupation tax, to maintain a minimum level of competence through participation in continuing legal education programs, and to adhere to the standards of professional conduct promulgated by the Texas Supreme Court. Tex. Tax Code § 191.142 (Vernon 1992); Tex. Gov't Code § 81.113 (Vernon 1988); *see also generally* Tex. Disciplinary R. of Prof. Conduct (Vernon Supp. 1993). The requirement that attorneys deposit client funds, in which they have no claim of beneficial ownership, in an IOLTA account rather than some other account is no greater burden than any other

obligation imposed upon the profession. Rather, participation in IOLTA is but a small recognition of the Bar's professional obligation to assist in providing meaningful access to our justice system for those members of the public who seek justice but who are unable to afford lawyers to represent them.

Moreover, Respondents Washington Legal Foundation and Mazzone lack standing to object to the way in which the money generated by the IOLTA program is used because they have no interest in the money. "It is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such a fashion as to comply with laws and the Constitution." *Lewis v. Casey*, 116 S. Ct. 2174, 2179 (1996).

II. RESPONDENT SUMMERS HAS NOT EXPERIENCED A TAKING OF HIS PROPERTY BECAUSE OF THE TEXAS IOLTA PROGRAM

The first thing a plaintiff invoking the Just Compensation Clause must show is a loss in connection with some cognizable property interest. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); *Pennsylvania Central Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) (holding that claim to compensation under Fifth Amendment must be based on actual loss to the owner rather than gain to the government). Respondent Summers failed utterly to show any such interest below.

The Texas IOLTA Program does not call for or permit lawyers to turn over principal belonging (or even potentially belonging) to their clients. Neither does the IOLTA program authorize lawyers to deposit client funds into an aggregated IOLTA account if the funds are capable of generating net interest for the client's benefit outside of the IOLTA process. Quite to the contrary, IOLTA allows only for the aggregation of client funds if the funds cannot reasonably be expected to generate interest income on their own. Summers, a client of Respondent Mazzone, does not allege, and did not offer proof in the District Court, that Mazzone should have deposited his funds into an individual account. In fact, he admitted that Mazzone informed him that his retainer was most likely incapable of generating net interest. (Summers Affidavit, J.A. at 86). Therefore, under established rules regarding property rights, Respondent Summers did not show that any of his property was taken by the Texas IOLTA Program. Summers can prevail only by successfully urging a new and expanded constitutional protection based on a proper reading of state law establishing property interests.

A. The Expectations of the Property Owner are Important

This Court's takings analysis "has traditionally been guided by the understanding of our citizens regarding the content of, and the State's control over, the 'bundle of rights' that they acquire when they obtain title to property." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). This analysis is necessarily informed by the type of property involved, the extent of the alleged

governmental interference, and the degree to which owners of that type of property reasonably expect governmental regulation of its use. *Id.* 1020-27 (discussing "harmful use" exception to takings claims relating to real property). As the Court explained in *Lucas*: "[t]he property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; . . . some values are enjoyed under an implied limitation and must yield to the police power." *Id.* at 1027 (quotation omitted).

Traditionally, maximum protection has been afforded to interests in real property. As Justice Scalia wrote for the *Lucas* majority, with respect to personal property, the owner, "by reason of the state's traditionally high degree of control over commercial dealings, . . . ought to be aware of the possibility that new regulation might even render his property economically worthless." *Id.* at 1027-28. This observation is borne out by this Court's holdings. For example, in *Andrus v. Allard*, 444 U.S. 51 (1979), this Court examined regulations promulgated by the Secretary of the Interior that completely prohibited any commercial transaction in certain bird feathers. The plaintiffs were engaged in the business of selling Indian artifacts containing feathers that were gathered before the regulations came into effect. *Id.* at 54. While acknowledging that the regulations effectively prohibited economically beneficial use of the plaintiffs' personal property, the Court nonetheless flatly rejected the plaintiffs' takings claim. This Court's opinion in *Lucas* reaffirmed this holding, but stressed that real property, by virtue of its elevated position in the hierarchy of property interests, is

subject to a different rule. 505 U.S. at 1028 (citing *Andrus*); *see also Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264 (1920) (rejecting takings claim of owner of alcoholic beverages "on hand at time" of prohibition).

Interests in income potential, as personal property, have been subject to a high degree of governmental control. Unlike rights in real property, or rights in personal property whose value is not inexorably linked with governmental control and regulation, interests in income potential have historically been subjected to a wide variety of restrictions deemed to serve the general welfare and have often not even been regarded as "property." *See, e.g., Featherstone v. Norman*, 153 S.E. 58 (Ga. 1930); *Wollenberger v. Hoover*, 179 N.E. 42 (Ill. 1931); 73 C.J.S. *Property* § 11 (1983). Indeed, as this Court noted in *Andrus*, "the interest in anticipated gains has traditionally been viewed as less compelling than other property related interests." 444 U.S. at 66.

When a client surrenders funds to an attorney, while retaining beneficial interest in the principal, what expectation does that client have to interest income? The answer depends on state law and the rules and regulations concerning banking practices. Absent a showing that state law recognizes a property right which can be realized within the framework of federal banking law, the claim of the client, Summers, must fail.

The only existing state law authority supporting the claim of the client against an IOLTA program is the opinion of the Fifth Circuit in this case. The touchstone of this opinion, and the only point at which the court explicitly refers to Texas authority, is the statement that "Texas

observes the traditional rule that 'interest follows principal,' which recognizes that interest earned on a deposit of principal belongs to the owner of the principal." (Pet. App. 8a). In support of this supposed general rule, the panel cited a 1972 Texas Supreme Court decision, *Sellers v. Harris County*, 483 S.W.2d 242 (Tex. 1972), a case in which a county had sought to retain $6,000 in accrued interest each month on a massive, unaggregated interpleader deposit while litigation over the principal was resolved.

Because *Sellers* is the only Texas authority upon which the Fifth Circuit relied for its conclusion, it deserves close consideration. Three very simple observations help fix the nature of the Fifth Circuit's analysis: First, the Fifth Circuit distilled Texas law to a "general rule" catch-phrase never used before or since in a Texas case. Second, the court ignored the fact that such a general rule would have some obvious exceptions. Finally, the panel glossed over substantial and material differences in the factual predicate of the only Texas case on which it relied.

Contrary to the Fifth Circuit's statement, the Texas Supreme Court in *Sellers* never once used the phrase, "interest follows principal," whether stated as a "traditional rule" or otherwise. Moreover, while the Fifth Circuit introduced its citation to *Sellers* with an "*e.g.*" signal, implying that other Texas cases also have espoused the "interest follows principal" rule, no other Texas cases exist which directly support this rule.

Second, the Fifth Circuit's declaration that "interest follows principal" is demonstrably wrong, at least if elevated to the level of an absolute legal rule. Consider, for example, an "income-only" trust. A settlor leaves a sum of money in trust, with income distributed to a designated beneficiary during life, and the corpus to another beneficiary on the income beneficiary's death. In such a case, interest does not follow principal. Instead, by the terms of the trust agreement, ownership is divided. *See, e.g., Price v. Austin Nat'l Bank*, 522 S.W.2d 725 (Tex. Civ. App.–Austin 1975, writ ref'd n.r.e.).

Another example is more arcane, but for Texans, much more pervasive. Texas is one of the nation's nine community property states. Suppose that a married depositor in Texas places his separate property in an interest-bearing account which he controls. Applying only the rule that "interest follows principal," one would conclude (wrongly) that the depositor should own all of the interest generated in the account. However, under long-settled rules, now codified, interest on the depositor's funds is owned jointly by the marital estate and may be distributed entirely to the other spouse upon dissolution. Tex. Family Code § 3.63 (Vernon 1993); *see also Commissioner v. Chase Manhattan Bank*, 259 F.2d 231, 239 (5th Cir. 1958) (interest derived form separate property during marriage is community property); *Mortenson v. Trammell*, 604 S.W.2d 269, 275 (Tex. Civ. App.–Corpus Christi 1984, writ ref'd n.r.e.) (same). Even worse, at least from the depositor's point of view, one must keep meticulous records. If the depositor cannot prove exactly how much of the money in the account is separate property principal and how much is attributable to community property interest, the entire sum, interest and principal

alike, will be deemed community property. *Estate of Hanau v. Hanau*, 730 S.W.2d 663, 667 (Tex. 1987). In such a case, the Fifth Circuit's supposed general rule would be stood on its head. Principal would follow interest. In sum, even if Texas did generally accept the notion that "interest follows principal," it would be, at most, a default rule subject to variance by contract (such as an "income only" trust) or by operation of law (such as the Texas community property statutes).

Because the "interest follows principal" rule cannot be a truly universal rule in Texas, the third point becomes crucial. The Fifth Circuit panel, while ostensibly relying on Texas property law as expressed in *Sellers*, did not mention any of the facts of the case, much less attempt to draw factual parallels between the interpleader account at issue in *Sellers* and IOLTA accounts. Instead, the panel simply distilled what it perceived to be the essence of *Sellers* – the questionable phrase "interest follows principal" – and applied the phrase to invalidate the Texas IOLTA Program. The only conclusion that can be drawn from *Sellers* is that, absent some other operation of law, a depositor is entitled to the net interest his funds generate.[14] *Sellers* did not suggest, as the Fifth Circuit has now held, that a principal owner is entitled to interest proceeds that are generated because of a governmental program that aggregates otherwise dormant funds.

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[14] The court in *Sellers* did not suggest that the owner of interpleaded funds was entitled to all of the interest earned, only that portion in excess of the cost to the county in handling the funds.

B. The Fifth Circuit Panel's Approach Misreads this Court's Takings Jurisprudence and Miscomprehends the IOLTA Program

The Fifth Circuit panel also relied on this Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), and identified a right, extant under the Fifth and Fourteenth Amendments, to IOLTA interest income on aggregated sums. Several judges vehemently dissented from this conclusion on Suggestion for Rehearing *En Banc*. Pet. App. at 42a-52a. The Fifth Circuit dissenters were correct.

This Court's opinion in *Webb's* did not announce a new immutable rule of property that a takings plaintiff has a property right to interest proceeds that result solely from aggregation with other deposits and as a result of the challenged governmental action. Rather, it merely observed the "usual and general rule" – recognized by Petitioners themselves – that interest generated by an interpleaded sum follows principal, finding a taking where that interest was held by the state *in addition to* a fee "for services rendered." *Webb's*, 449 U.S. at 164-65. The Court "express[ed] no view as to the constitutionality of a statute that prescribes a county's retention of the interest earned, where the interest would be the only return to the county for its services." *Id.* at 165. Thus, contrary to Respondent Summers' suggestion, *Webb's* does not support the conclusion that interest invariably belongs to the individual whose principal played a small role in generating it, especially where that principal could not have generated that interest but for the governmental action he challenges.

The *Webb's* case involved a deposit of $1.8 million into the registry of the state court after an agreement to purchase the assets of Webb's Fabulous Pharmacies foundered upon the discovery of undisclosed debt. While the litigation proceeded, the tendered funds generated more than $100,000 in interest. When the court appointed a receiver for Webb's that was admittedly entitled to the principal, a dispute arose concerning the rights to the accumulated interest. The court clerk had retained $10,000 as an "administrative fee," as well as the more than $100,000 in accrued interest. The Florida Supreme Court affirmed, permitting the county to retain the entirety of the accumulated interest.

This Court began its analysis by noting that "[i]t is at once apparent that Florida's statute would allow Respondent Seminole County to exact two tolls while the interpleader fund was held by the clerk of the court." *Id.* at 159. The first would be the $10,000 fee "for services rendered" and the second would be the roughly $100,000 in interest. *Id.* Conceding that the existence of a cognizable property interest turned on state law and the legitimacy *vel non* of the expectation to the proceeds, the Court found that the owners had a reasonable and substantial expectation to the principal and the interest, although it left the $10,000 fee undisturbed. The Court was careful to note that less drastic exactions meant merely to "adjust the benefits and burdens of economic life in order to promote the common good" could not be deemed a taking, even though a property owner is denied "some beneficial use of his property" or restricted in its full exploitation. *Id.* The Court was also careful to point

out that its holding was limited to "the narrow circumstances of this case – where there is a separate and distinct state statute authorizing a clerk's fee 'for services rendered,'" which it allowed the state to retain. *Id.* at 164.

While this case also involves a claim of entitlement to interest proceeds, the similarities end there. In fact, there are at least three material differences that the Fifth Circuit panel failed to consider.

1. The *Webb's* Owners Reasonably Expected that Their Principal Would Generate Net Interest Income

Insofar as *Webb's* stands for the proposition that an owner of funds is entitled to interest on interpleaded funds that are capable of and, in fact, do generate net interest, Petitioners agree. In fact, the Texas Supreme Court has so held. *Sellers v. Harris County*, 483 S.W.2d 242 (Tex. 1972). But IOLTA presents a materially different situation. As explained more fully above, *supra* II.A., the expectations of a property owner are crucial to any takings analysis. The *Webb's* claimants had a reasonable expectation that their principal would generate net interest. In fact, their principal generated more than $100,000 in interest income. In stark contrast, the IOLTA program does not authorize funds to be included into an aggregated IOLTA account if they are capable of generating *any* net interest to the owner.

Viewed against the reasonable expectation of the owner, the claimants in *Webb's* had suffered a loss. They were not seeking interest that would have been eclipsed by the county's cost in setting up the bank account. In

fact, they did not appear to even seek that portion of the interest proceeds that represented the actual cost of creating and maintaining the account. Having tendered in excess of $1.8 million for deposit under state law into an interest bearing account, there was an obvious and substantial expectation that those funds would generate net interest. The Florida rule prohibited the *Webb's* claimants from receiving any of that interest income. Exactly the reverse is true here: Neither Respondent Summers, nor any other client, has suffered any monetary loss as a result of the IOLTA process. Rather, they see a gain that they could not have realized on their own and wish to claim it as "just compensation."

This Court has repeatedly refused to recognize any entitlement to compensation premised upon the gain realized by the putative taker rather than the actual loss to the Plaintiff. *See, e.g., Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) ("Because gain to the taker . . . may be wholly unrelated to the deprivation imposed upon the owner, it must . . . be rejected as a measure of public obligation to requite for that deprivation."); *United States v. Causby*, 328 U.S. 256, 261 (1946) (rejecting argument that measure of value of taken property could include taker's gain); *United States v. Miller*, 317 U.S. 369, 375 (1942) (holding that takings plaintiff can recover "no more than indemnity for his loss"). It follows rather naturally that a plaintiff may not hinge his entire takings claim on the presence of a gain to the government, in the complete absence of any economic loss to himself.

Unlike the *Webb's* claimants, Respondent Summers is seeking money that his funds could not earn. He has not seen a decline in the value of his property as a result of

the action he challenges. Thus, he has not suffered a "taking" of his property requiring "just compensation." *Cf. Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1665 (1997) ("Only takings without just 'compensation' infringe [the Fifth] Amendment.").

2. Clients are Not Charged Twice for Using the Texas Legal System

The *Webb's* claimants were charged $10,000 for the "service" of having an account opened and were also denied the more than $100,000 of interest directly attributable to those funds. The *Webb's* opinion leaves no doubt that this attempt at what amounts to double billing for a single service weighed heavily in the Court's analysis and its holding. It should be clear that Respondent Summers was not asked to pay anything when his funds were deposited in an IOLTA account.

3. The IOLTA Program Does Not Create an Incentive to Withhold Principal or Permit Such Abuse to Occur

In its evaluation of the Florida interpleader regime, the Court expressed concern that permitting the state to retain all interest proceeds, including interest in excess of the administrative cost of maintaining the account, created a disincentive for resolution of the underlying legal dispute. "If the County were entitled to the interest, its officials would feel an inherent pressure and possess a natural inclination to defer distribution, for that interest return would be greater the longer the fund is held; there

would be, therefore, a built-in disincentive against distributing the principal to those entitled to it." *Webb's*, 449 U.S. at 162. The IOLTA program creates no such risk. The duration of an IOLTA deposit is entirely within the control of the attorney and his client. Indeed, as noted above, this is why the ethical prohibition against attorneys benefiting from client funds exists. By prohibiting lawyers from earning interest on client trust funds, the rules diminish the possibility of such abuse occurring.

C. Incidental Restrictions on Beneficial Use Do Not Amount to a Violation of the Fourteenth Amendment's Due Process Clause

While Respondents cannot claim to have lost interest income as a result of the Texas IOLTA Program, Respondent Summers claimed below that he had lost the right to exclude others from making beneficial use of his property, which he claims is an integral component of the "bundle of rights" associated with his "title" to money. Indeed, this is a very strange takings argument. It is doubtful that "title" to money includes, as a matter of common law, the right to exclude beneficial use of it by the state. *See, e.g., Washington Legal Found. v. Massachusetts Legal Found.*, 993 F.2d 962, 974 (1st Cir. 1993) (finding no such interest). The argument is especially tenuous in the context of funds that have been tendered to a bank for deposit.

1. Respondent Summers Has Surrendered Control Over the Use of His Funds

A person tendering funds into any bank deposit cannot seriously believe that he has retained the right to exclusive use of them, let alone, to exclude others from making beneficial use of those funds while they are on deposit. If Respondent Summers deposits a one-hundred dollar bill into any bank account – a decision utterly unaffected by the existence of the IOLTA program – he will be sorely disappointed if he appears the next day and demands the same bill back. A bank accepts deposits only because it is able to assume complete control of the money until it is demanded by the depositor. By aggregating depositors' funds and making some beneficial use of them – without consulting with the depositors – the bank hopes to generate returns that will exceed what it has agreed to pay the depositors. This was precisely the point of George Bailey's desperate speech in the lobby of the Bailey Building & Loan during the Bedford Falls' bank scare. *It's A Wonderful Life* (1938) ("You're thinking of this place all wrong, as if I had the money back in the safe. The money's not here. Well, your money's in Joe's house – that's right next to yours – and in the Kennedy house, and Mrs. MacLain's house, and a hundred others."). Regardless of whether Respondent Summers chooses to travel in the circles of the Baileys or the Potters of this world, no bank will hold his currency without the unfettered right to make "beneficial use" of it.

Of course, prior to IOLTA, Respondent Summers had no right to control the use of money that he deposited

with his attorney. It was all placed in a demand account, and the bank, not Mr. Summers, decided what it would do with the interest it earned. The bank could have used that money to facilitate pro bono legal services to the poor without first seeking Summers' permission. The fact that it chose to use the interest it earned to enhance the investment of its stockholders does not alter the constitutional analysis from Mr. Summers' perspective. In all events, Mr. Summers had no right to direct the beneficial use of his deposits before IOLTA. Nothing in the IOLTA rules diminishes his control in any way. Thus, stated either in terms of his property – he had nothing to lose – or his injury – he is no worse off than before, Respondent Summers has no judicially cognizable claim against Petitioners as a result of the adoption of the Texas IOLTA Program.

Indeed, even after IOLTA, if Respondent Summers prefers to retain the exclusive right of beneficial use of his money, he is free to do so, assuming neither his lawyer nor some other third party insists on some other arrangement. Nothing in the IOLTA rules prevents a client from simply placing his money in a safety deposit box in order to prevent others from making beneficial use of it. Of course, that money will earn no interest and the bank will charge him a fee. Nonetheless, he can rest secure in the knowledge that no one has taken his perceived right to prevent a beneficial use of his money. While Petitioners have made no effort to prevent this, it has been discussed elsewhere. *See* Matthew 25:14-30 (condemning the "wicked and slothful servant" for burying his money).

2. Even Assuming that Respondent Summers' "Right to Exclude Beneficial Use" Exists, Its Denial Would Not Give Rise to A Claim for Just Compensation

Even if one ignores the fact that Summers himself has surrendered his supposed right to prevent beneficial use of his money, governmental regulation affecting the use of property "does not cause a taking unless the interference is significant." *Washington Legal Found.*, 993 F.2d at 976 (citing *Andrus*, 444 U.S. at 66-67). It is undisputed that the IOLTA program does not take any principal. Likewise, it does not deprive Respondents of any interest income that could have been earned in its absence. Where nothing of value is taken, "nothing [is] recoverable as just compensation." *Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280, 282 (1926).

To be sure, the common law of real property includes rights of exclusivity that are important in that context. Without the right to exclude others, there is no way for the owner of real property to exercise his rights of possession. Unlike the owner of personal property, he may not simply carry real property away. Thus, the government cannot, for example, require a landowner to dedicate his property to permanent public use. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994). That said, even where real property is concerned, the interest in excluding others has never been regarded as so absolute that a minor or temporary deprivation would require compensation. *See State v. Shack*, 277 A.2d 369 (N.J. 1971) (rejecting common-law property right to exclusive use of real property against governmental efforts to provide services to migrant workers located thereon); *Agricultural Labor Relations Bd. v. Superior Court*, 546 P.2d 687 (Cal. 1976) (same claim rejecting takings).

Even if one generously assumes that the right to exclude the government from beneficial use of money exists as a strand in the "bundle of rights," this Court has already held that denial of a strand in the bundle of personal property rights is not a taking. *Andrus*, 444 U.S. at 66-67; *Webb's*, 449 U.S. at 163. For example, this Court has refused to find a taking where private employers were forced to pay premiums to a government corporation to benefit others, noting that "it cannot be said that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211, 223 (1986); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (upholding statute requiring mine operators to pay benefits despite absence of any such contract); *see also Truax v. Corrigan*, 257 U.S. 312, 347-49 (1921) (Holmes, J., dissenting). The Just Compensation Clause is not a vehicle for the enforcement of ideology in the absence of concrete injury in the value or actual use of property. *See, e.g., United States v. 564.54 Acres of Land*, 441 U.S. 506, 512 (1979) ("In view . . . of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his . . . idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.") (quoting *Kimball Laundry Co.*, 338 U.S. at 5). Rather, as the text of the Clause confirms, it protects the citizen's right to compensation for an economic loss. *564.54 Acres of Land*, 441 U.S. at 512; *Carroll v. State Bar of Cal.*, 166 Cal. App. 3d 1193, 213 Cal.

Rptr. 305 (Cal. Ct. App. 1984); *see also* Brief of Nat'l Conf. of State Legislatures, et al.

In *United States v. Causby*, the Court found a taking requiring just compensation to result from the flight of multi-engine bombers at a height of 80 feet over the plaintiff's farm, causing his chickens to be killed from "flying into the walls from fright." 328 U.S. at 259. In its holding, the Court emphasized the actual and substantial loss to Causby. The Court rejected the preposterous notion that Causby could have premised his claim on the common-law right to make exclusive use of land to the periphery of the universe. *Id.* At bottom, Respondent Summers is simply retreading this ground.

The stated basis of the claim in this case is not that the challenged action has materially interfered with some profitable use of Respondent Summers' property, but, instead, that Summers objects to someone else's use. In essence, Respondent is standing in the shoes of farmer Causby's distant, grumpy neighbor who keeps no chickens and hears no engines, but merely objects to the notion of aircraft flying through territory that, at common law, belonged to him.

Any interference with Respondent Summers' supposed right to prevent prospective beneficial use of his property simply does not have compensable value. Even when real property has been literally "taken" from its owner, the great weight of authority holds that the value of the prospective use to which the owner might put the property is either not "taken" or does not require compensation. *Pennsylvania Central Transp. Co. v. City of New*

York, 438 U.S. 104, 124-25 (1978) (looking to investment-backed expectations and finding no taking where landowners were prohibited from building in air space above land); *United States v. Petty Motor Co.*, 327 U.S. 372, 377-78 (1946) (rejecting compensation for lost profits or damage to good will).

Money derives its value from its status as legal tender, not from the right to exclusive possession. *See, e.g., Washington Legal Found.*, 993 F.2d at 974 n.10 ("[W]e do not find analogous, intangible property rights which, by their nature or by agreement, require the exclusion of others to preserve the property interest."). Indeed, the entire purpose of money is to create something that is fungible. To the extent that Respondent Summers has some personal and peculiar value associated with preventing others from benefiting from it, that value is not generally recognized and, in any event, has been voluntarily surrendered when he deposits his money in a bank (or directs his lawyer to do so).[15]

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[15] One doubting that Respondent Summers' supposed right to exclude beneficial use of his money by the government has no compensable economic value might propose the following transaction to any rational person. Withdraw a one-hundred dollar bill from your wallet and tell that person you are offering to sell him, not the one-hundred dollar bill, but the right to exclude the government from making beneficial use of it. Then ask him what he thinks your offer is worth.

* * *

None of the Respondents has suffered any cognizable economic loss as a result of the operation of the Texas IOLTA Program. Respondent Summers has no claim under the Just Compensation Clause for the deprivation of his supposed right to exclude the government from benefiting from his money. At bottom, this challenge to IOLTA is less an effort to recoup any lost income than a challenge based on political ideology going to the very heart of these programs that serve the public good. This is not a takings claim.

By challenging IOLTA, Respondents attack the programs that provide many of America's elderly, its homeless, its sick, and its poor access to our justice system. Notwithstanding Respondents' philosophical objections, when our profession accounts to history in defense of its stewardship of the rule of law, its claim will rest on the extent to which access to justice has been provided to those who cannot afford it. For without public confidence in our justice system, the rule of law cannot survive.

CONCLUSION

The Fifth Circuit panel's opinion below is contrary to decisions of two other federal circuits and several state courts of last resort. It rests on a misreading of one decision of this Court and another of the Texas Supreme Court. The result reached is flatly contrary to these decisions, federal banking laws, and this Court's takings jurisprudence. This Court should reverse.

Respectfully submitted,

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